Supreme Court, U.S.
FILED
SEP 9 - 2009
OFFICE OF THE CLERK

No. 09-35

In the Supreme Court of the United States

MANUEL ANTONIO NORIEGA, PETITIONER

v.

GEORGE PASTRANA, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether Section 5 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2631, precludes petitioner from invoking the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, as a source of rights in a habeas corpus proceeding.

2. Whether, assuming petitioner can assert a claim based on the Geneva Convention, his extradition to France would violate the Convention.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Boumediene v. *Bush*, 128 S. Ct. 2229 (2008) 8
El Al Israel Airlines, Ltds. v *Tsui Yuan Tseng*, 525 U.S. 155 (1999) 11
Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 7
Head Money Cases, 112 U.S. 580 (1884) 7
Medellin v. *Texas*, 128 S. Ct. 1346 (2008) 7, 8
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 11
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 11
United States v. *Noriega*:
808 F. Supp. 791 (S.D. Fla. 1992) 3
117 F.3d 1206 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998) 2

Constitution, treaties and statutes:

U.S. Const.:
Art. I, § 9 (Suspension Clause) 8
Art. VI (Supremacy Clause) 8

Treaties and statutes—Continued: Page

Geneva Convention, July 27, 1929, 47 Stat. 2021 7
Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 11
Art. 45, 6 U.S.T. 3546 11
Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ..... *passim*
Art. 12, 6 U.S.T. 3328 ..... 5, 9
Art. 118, 6 U.S.T. 3406 ..... 5, 9
Art. 119, 6 U.S.T. 3408 ..... 5, 9
Art. 129, 6 U.S.T. 3418 10
Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600:
§ 5, 120 Stat. 2631 ..... 4, 5, 6, 7, 8
§ 5(a), 120 Stat. 2631 ..... 4, 6
§ 7, 120 Stat. 2635 8
18 U.S.C. 1952(a)(3) 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
21 U.S.C. 959 2
21 U.S.C. 963 2
28 U.S.C. 2241 4
28 U.S.C. 2255 3

Miscellaneous:

152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) 7

Miscellaneous—Continued: Page

H.R. Rep. No. 664, 109th Cong., 2d Sess. Pt. 2 (2006) .. 6, 7
H.R. Rep. No. 731, 109th Cong., 2d Sess. (2006) 7

In the Supreme Court of the United States

No. 09-35

MANUEL ANTONIO NORIEGA, PETITIONER

v.

GEORGE PASTRANA, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 564 F.3d 1290. The opinion of the district court (Pet. App. 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2009. The petition for a writ of certiorari was filed on July 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After the Government of France requested that petitioner be extradited from the United States, a magistrate judge in the United States District Court for the Southern District of Florida certified that petitioner is subject to extradition under the applicable treaty. The

district court denied petitioner's petition for a writ of habeas corpus claiming that his extradition would violate the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, and the court of appeals affirmed. Pet. App. 1a-18a.

1. In 1988, a federal grand jury in the Southern District of Florida returned an indictment charging petitioner with numerous drug-trafficking offenses. At the time, petitioner was the commander of the Panamanian Defense Forces in the Republic of Panama. Panama's president discharged petitioner from his military post, but petitioner refused to accept his dismissal, and he seized power. After petitioner declared that a state of war existed between the United States and Panama, the United States sent armed forces into Panama. Petitioner eventually surrendered to United States military officials, who returned him to Miami to face the drug charges against him. *United States* v. *Noriega*, 117 F.3d 1206, 1209-1210 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998).

Following a jury trial, petitioner was convicted of racketeering conspiracy and racketeering, in violation of 18 U.S.C. 1962(c) and (d); conspiracy to import and distribute cocaine, in violation of 21 U.S.C. 963; two counts of distribution of cocaine and one count of manufacture of cocaine, in violation of 21 U.S.C. 959; conspiracy to manufacture, to distribute, and to import cocaine, in violation of 21 U.S.C. 963; and interstate or foreign travel to promote an unlawful enterprise, in violation of 18 U.S.C. 1952(a)(3). He was sentenced to a total of 40 years of imprisonment, but the sentence was later reduced to 30 years. *Noriega*, 117 F.3d at 1210; Pet. App. 2a-3a.

In response to petitioner's concerns about the conditions of his confinement, the district court determined that petitioner is a prisoner of war entitled to the benefits conferred upon prisoners of war under the Third Geneva Convention. *United States* v. *Noriega*, 808 F. Supp. 791, 793-796 (S.D. Fla. 1992). Without agreeing that petitioner should be designated a prisoner of war, the government did not appeal that determination, and it afforded him all the protections of a prisoner of war. *Id.* at 794 n.4.

2. Petitioner was scheduled to be released on parole in September 2007. Pet. App. 3a. On July 17, 2007, at the request of the Government of the Republic of France, the United States filed a complaint for the extradition of petitioner to France under the extradition treaty between the United States and France. *Ibid.* Petitioner had been convicted *in absentia* in France on charges of engaging in financial transactions with the proceeds of illegal drug trafficking. *Id.* at 3a n.2. Upon his surrender to France, petitioner will have an opportunity to seek a new trial. *Ibid.*

3. Petitioner filed a motion in his criminal case under 28 U.S.C. 2255, claiming that his extradition to France would violate his rights under the Third Geneva Convention. The district court denied the motion for lack of jurisdiction because petitioner was not challenging his criminal sentence. The court nevertheless addressed the merits of petitioner's argument and stated that, even if it had jurisdiction, it would deny the motion because the Third Geneva Convention did not bar petitioner's extradition. Pet. App. 36a-50a.

Following the denial of petitioner's motion under Section 2255, a magistrate judge held an extradition hearing and issued a certificate of extraditability. Pet.

App. 23a. Petitioner then filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, once again in his criminal case. The district court again dismissed the petition for failure to file it as a new civil action, but it nevertheless opined that it would have denied the petition on the merits in any event. Pet. App. 29a-35a.

4. Petitioner filed a separate petition for a writ of habeas corpus. The district court denied the petition, adopting the findings of fact and conclusions of law set forth in its earlier orders, and holding that the Third Geneva Convention did not bar petitioner's extradition to France. Pet. App. 19a-28a.

5. The court of appeals affirmed. Pet. App. 1a-18a. For two independent reasons, the court concluded that petitioner had failed to show that the Third Geneva Convention prevented his extradition to France.

First, the court of appeals held that Section 5 of the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2631, removed the ability of individuals to invoke the Third Geneva Convention as a basis for relief in a civil action against the United States. Pet. App. 11a-14a. That provision states:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a), 120 Stat. 2631. Based on an examination of the plain language and legislative history of Section 5, the court concluded that petitioner was precluded from

arguing that his extradition would be barred by the convention. *Ibid.*

Second, the court of appeals held that, "assuming arguendo that the Third Geneva Convention is self-executing and that § 5 of the MCA does not preclude [petitioner's] claim," Pet. App. 14a, the Third Geneva Convention did not bar petitioner's extradition to France, and the United States had complied with its obligations under the convention. *Id.* at 14a-18a. Acknowledging that Article 118 of the Third Geneva Convention provides for the prompt repatriation of prisoners of war after the cessation of hostilities, the court noted that Article 119 authorizes the detention of prisoners of war against whom criminal proceedings are pending. Thus, that provision authorized the detention of petitioner for the completion of his criminal sentence in the United States. *Id.* at 14a-15a. And, the court explained, nothing else in the convention suggests "that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another." *Id.* at 15a. The court found further support for its conclusion in Article 12, which allows for transfer of a prisoner of war from one party to the Convention to another as long as the "Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." *Ibid.* In this case, the court observed, "these conditions have been satisfied." *Id.* at 16a. Finding no other suggestion in the convention that it was meant to prevent a contracting party from abiding by its obligations under extradition treaties, the court concluded that petitioner's extradition "would not violate [his] rights under the Third Geneva Convention." *Id.* at 18a.

ARGUMENT

Petitioner renews his claim (Pet. 7-23) that, because he has been afforded prisoner-of-war status, his extradition to France would violate the Third Geneva Convention. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision below is of limited ongoing significance, because petitioner is the only person currently detained by the United States as a prisoner of war. Further review is not warranted.

1. Section 5 of the MCA provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or * * * agent of the United States is a party as a source of rights in any court." MCA § 5(a), 120 Stat. 2631. Petitioner's habeas corpus petition sought to invoke the Third Geneva Convention "as a source of rights" preventing his extradition, and it was therefore precluded by the plain language of Section 5.

Petitioner suggests (Pet. 10) that Section 5 applies only to certain rights under the convention, such as "the right to counsel, the right to confront ones accusers, [and] the right to know the charges against one," but that it does not address the rights he seeks to invoke. That limited reading finds no support in the text of Section 5, and, as the court of appeals noted, it is also inconsistent with the legislative history. Pet. App. 13a-14a. That history shows that Congress intended Section 5 to "prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States." H.R. Rep.

No. 664, 109th Cong., 2d Sess. Pt. 2, at 17 (2006); see H.R. Rep. No. 731, 109th Cong., 2d Sess. 39 (2006) ("Section 5 of the MCA clarifies that the Geneva Conventions are not an enforceable source of rights in any habeas corpus or other civil action or proceeding by an individual in U.S. courts."); 152 Cong. Rec. S10,400 (daily ed. Sept. 28, 2006) (statement of Sen. Kennedy) ("[T]he bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights.").

Petitioner contends (Pet. 11) that the court of appeals' interpretation of Section 5 of the MCA results in the "complete repudiation of the Geneva Convention." That is incorrect. A treaty is "primarily a compact between independent nations," and its enforcement is generally a matter of international negotiations, not a subject of redress in domestic courts. *Head Money Cases*, 112 U.S. 580, 598 (1884); see *Medellin* v. *Texas*, 128 S. Ct. 1346, 1357 & n.3 (2008). This Court has not decided whether the Third Geneva Convention conferred judicially enforceable rights on individuals before the MCA was enacted, see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 626-628 (2006), and the court of appeals had no occasion to resolve that question in this case, Pet. App. 9a-11a. Whatever the domestic effect of the Third Geneva Convention before the enactment of the MCA, the court of appeals correctly recognized that "it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty." *Id.* at 9a-10a; see *Medellin*, 128 S. Ct. at 1359 n.5 ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."). And, as the court of appeals made clear, its reading of Section 5 of the MCA does not change the international obligations of the United States under the

Geneva Conventions. Pet. App. 11a. The only result of the enactment of that provision is that "Congress has superseded whatever domestic effect the Geneva Conventions may have had in actions such as this." *Ibid.*

Petitioner asserts (Pet. 12) that the decision of the court of appeals "encroaches upon the powers of the Executive and Legislative branches." But because "a later-in-time federal statute supersedes inconsistent treaty provisions," *Medellin*, 128 S. Ct. at 1359 n.5, the decision below correctly gives effect to the statute that Congress enacted. He also suggests (Pet. 11) that Section 5 violates the Supremacy Clause, U.S. Const. Art. VI, to the extent that it conflicts with the Third Geneva Convention, but that argument is foreclosed by the well-established principle, noted above, that a later-enacted statute may supersede a treaty.*

2. As the court of appeals recognized, petitioner's claims fail for the independent reason that the Third Geneva Convention does not prohibit the extradition of a prisoner of war to face criminal charges in another country. Pet. App. 14a-18a. Petitioner's challenges to that conclusion (Pet. 13-23) lack merit.

---

* As petitioner acknowledges (Pet. 10), *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008), invalidated a different provision of the MCA but did not address Section 5. In *Boumediene*, the Court concluded that Section 7 of the MCA, 120 Stat. 2635, violated the Suspension Clause, U.S. Const. Art. I, § 9, because it "deprive[d] the federal courts of jurisdiction to entertain the habeas corpus actions" brought by alien enemy combatants, and the Court held that provision unconstitutional to that extent. *Boumediene*, 128 S. Ct. at 2244, 2274; see Pet. App. 6a. Unlike Section 7, which was a jurisdiction-stripping provision, Section 5 does nothing to prevent a person from seeking habeas relief. It merely removes "one substantive provision of law upon which a party might rely in seeking habeas relief." *Ibid.*

Petitioner focuses (Pet. 13) on Article 118 of the Third Geneva Convention, which provides that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." 6 U.S.T. at 3406. But Article 118 is limited by Article 119, which states that "[p]risoners of war against whom criminal proceedings for an indictable offence are pending may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment. The same shall apply to prisoners of war already convicted for an indictable offence." 6 U.S.T. at 3408. As the court of appeals noted, Article 119 has allowed the United States to retain custody over petitioner after hostilities in Panama ceased, to try him for the crimes with which he was charged, and to hold him for the duration of his criminal sentence. Pet. App. 15a. That provision also permits a party to the convention to honor an extradition treaty by transferring a prisoner of war to another party to the convention to face criminal charges there. See *ibid.* ("Nowhere * * * [in Article 119] is it suggested that a prisoner of war may not be extradited from one party to the Convention to face criminal charges in another.").

The only provision of the Third Geneva Convention to restrict extradition is Article 12, which provides for the transfer of prisoners of war between parties to the convention "after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention." 6 U.S.T. at 3328. In this case, as both the district court and court of appeals confirmed, the conditions specified in Article 12 have been satisfied by means of diplomatic communications between France and the United States. Pet. App. 16a, 31a-32a. But nothing in Article 12 "implies that a con-

tracting party cannot abide by a valid extradition treaty and extradite a prisoner of war to another contracting party simply because the person is a prisoner of war." *Id.* at 16a.

Petitioner maintains (Pet. 21) that the absence of the term "extradition" in the Third Geneva Convention, along with a specific reference in Article 129 to the transfer from one party to another of war criminals, means that prisoners of war may not be extradited, and that they may only be transferred to another nation if they are war criminals. But that reading of the convention does not comport with Article 12, which places only the two restrictions noted above on the transfer of a prisoner of war: that the transfer be to another contracting party, and that the transferee country give assurances that the convention will be followed. Article 129 discusses only the ongoing duty of each contracting party to search for war criminals and bring them to justice, and it places no further restrictions on the transfer of prisoners of war. 6 U.S.T. at 3418.

More fundamentally, petitioner's argument (Pet. 14) based on a lack of "specific authority permitting extradition of prisoners of war" misses the mark. The authority to extradite comes not from the Third Geneva Convention itself but from pre-existing extradition treaties, such as the one between the United States and France that is at issue here. The lack of any indication in the Third Geneva Convention that it is intended to invalidate or supersede such treaties shows that a contracting party to the Convention retains its authority to abide by its other international obligations, including its obligations under valid extradition treaties. Pet. App. 17a n.10.

Petitioner also asserts (Pet. 15-18) that the courts below should not have relied on language in Article 45 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, which provides for the transfer of civilians between parties to the Convention and specifically provides that it does not bar extradition. The court of appeals, like the district court, recognized that the Third and Fourth Geneva Conventions are distinct, but nevertheless found it persuasive that the parties to the conventions contemplated that "transfer" included extradition. Pet. App. 17a, 41a-42a. "To conclude otherwise," the court of appeals reasoned, "would mean that a country would be obligated to extradite a civilian, but not a prisoner of war, when they are facing identical criminal charges." *Id.* at 17a. It was appropriate for the courts below to support their interpretation of the Third Geneva Convention by reading the Geneva Conventions as a whole and harmonizing provisions with similar underlying principles. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 167-169 (1999).

In sum, the court of appeals' conclusion that petitioner's extradition to France is not barred by the Third Geneva Convention is a reasonable construction of the convention that comports with its text and overall purposes. The court of appeals' reading is also consistent with the views of the Executive Branch, which are entitled to respect. See *Medellin*, 128 S. Ct. at 1361; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982) ("Although not conclusive, the meaning attributed to treaty provisions by the Government agen-

cies charged with their negotiation and enforcement is entitled to great weight.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

SEPTEMBER 2009